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CHARLES EUGENE BROOKS

Clerk

# Supreme Court of the United States

OCTOBER TERM, 1937

NO. 705.

PETROLEUM EXPLORATION, a Maine Corporation,  
Appellant,

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY, a  
Kentucky Body Corporate, J. C. W. BECKHAM,  
THOS. C. McGREGOR and JAMES W.  
CAMMACK, Appellees.

Appeal From the District Court of the United States for  
the Eastern District of Kentucky.

**APPELLANT'S MOTION FOR INJUNCTIVE RELIEF  
PENDING APPEAL AND STATEMENT OF  
FACTS AND ACCOMPANYING BRIEF  
IN SUPPORT THEREOF.**

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Sistersville, West Virginia,  
*Counsel for the Appellant.*

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## INDEX.

	PAGE
Motion .....	1-3
Statement of Facts .....	3-8
Appellant's gas sale contracts .....	3-4
Distributors' franchise rate contracts .....	4
Proceedings before and action of Commission..	4-5
Proceedings before and action of District Court	5-8
Imminence of penalties and loss of property...	8
Irreparable injury .....	8
Brief .....	9-18
Appellant's status as a utility vel non.....	9
Separability of appellant's gas sales.....	10
Validity of franchise rate contracts.....	10-13
Loss of property without due process.....	13
Federal equity jurisdiction .....	13-14
Johnson Act inapplicable .....	14-16
Legislative fiat .....	16
Certain cases inapplicable .....	16
Public not harmed by injunction pending appeal	17
Appendix .....	18-48
Kentucky Utilities Act .....	18-28
Commission's order of May 29, 1937.....	28-30
Commission's order of June 29, 1937.....	31-32
District Court's decree of July 28, 1937.....	33
District Court's decree of August 7, 1937.....	34-35
District Court's decree of January 6, 1938....	35-37
District Court's majority opinion.....	37-42
District Court's minority opinion.....	43-48

## TABLE OF CASES.

	PAGE
Allen v. Railroad Commission, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249 . . . . .	10
Baltimore & Ohio Railroad Co. v. United States, 264 U. S. 258, 68 L. ed. 667 . . . . .	16
Bastin Telephone Co. v. Mount, 176 Ky. 26, 195 S. W. 112 . . . . .	11
Campbellsville v. Taylor County Telephone Co., 229 Ky. 1843, 18 S. W. (2d) 305 . . . . .	11
Carter v. Carter Coal Co., 298 U. S. 238, 80 L. ed. 1160 . . . . .	13
Central Kentucky Natural Gas Co. v. City of Lexington, 260 Ky. 361, 85 S. W. (2d) 870 . . . . .	11
Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 67 L. ed. 1103 . . . . .	15
Chenery v. Employers' Liability Assur. Corp. (9th C. C. A.), 4 Fed. (2d) 826 . . . . .	10
Chicago, B. & Q. Railroad Co. v. Osborne, 265 U. S. 14, 68 L. ed. 878 . . . . .	14
Cincinnati v. Vester, 281 U. S. 439, 74 L. ed. 950 . . . . .	15
City Bank Farmers Trust Co. v. Schnader, 291 U. S. 24, 78 L. ed. 628 . . . . .	13, 14
City of Louisville v. Louisville Home Telephone Co., 149 Ky. 234, 148 S. W. 13 . . . . .	11
City of Ludlow v. Union Light, Heat & Power Co., 231 Ky. 815, 22 S. W. (2d) 909 . . . . .	11
Corporation Commission v. Carey, 96 U. S. 452, 80 L. ed. 324 . . . . .	15
Detroit v. Detroit Citizens' Street Railway Co., 184 U. S. 368, 46 L. ed. 593 . . . . .	12
Di Giovanni v. Camden Fire Ins. Co., 296 U. S. 64, 80 L. ed. 47 . . . . .	14
Euclid v. Ambler Realty Co., 272 U. S. 365, 71 L. ed. 303 . . . . .	13
Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160, 71 L. ed. 978 . . . . .	16

*Table of Cases.*

	PAGE
Frost v. Railroad Commission, 271 U. S. 583, 70 L. ed. 1101 .....	16
Henrietta Mills v. Rutherford County, 281 U. S. 121, 74 L. ed. 737 .....	14
Home Telegraph & Telephone Co. v. Los Angeles, 211 U. S. 265, 53 L. ed. 176.....	12
Interstate Commerce Commission v. Louisville & Nashville Railroad Co., 227 U. S. 88, 57 L. ed. 431 .....	16
Irvine Toll Bridge Co. v. Estill County, 210 Ky. 170, 275 S. W. 634 .....	11
Kentucky Utilities Co. v. City of Paris, 237 Ky. 488, 35 S. W. (2d) 873 .....	11
Los Angeles v. Los Angeles Water Co., 176 U. S. 558, 44 L. ed. 886 .....	12
Louisville Home Telephone Co. v. City of Louisville, 130 Ky. 611, 113 S. W. 855.....	11
Lutes v. Fayette Home Telephone Co., 155 Ky. 555, 160 S. W. 179 .....	11
Michigan Public Utilities Commission v. Duke, 266 U. S. 570, 69 L. ed. 445 .....	13, 15, 16
Moberly v. Richmond Telephone Co., 126 Ky. 369, 103 S. W. 714 .....	11
Mountain States Power Co. v. Public Service Commission, 299 U. S. 167, 81 L. ed. 99.....	15
Natural Gas Pipeline Co. v. Slattery, 82 L. ed. (Adv. Ops.) 205 .....	9, 16
Northern Pacific Railroad Co. v. Department of Public Works, 268 U. S. 39, 69 L. ed. 826.....	16
Nowata County Gas Co. v. Henry Oil Co. (8th C. A.), 269 Fed. 742.....	9
Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. ed. 659 .....	14
Packard v. Banton, 264 U. S. 140, 68 L. ed. 596.....	13

*Table of Cases.*

	<i>PAGE</i>
Paducah v. Paducah Railway Co., 261 U. S. 267, 67 L. ed. 647 .....	11
Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. 446 .....	13
Pennsylvania v. West Virginia, 262 U. S. 553, 67 L. ed. 1117 .....	13
Pennsylvania R. Co. v. Pittsburgh L. & W. R. Co. (6th C. C. A.), 83 Fed. (2d) 861, cert. den. 299 U. S. 572, 81 L. ed. 421.....	9
Peoples Banking Co. v. Sterling, 300 U. S. 175, 81 L. ed. 586 .....	12
Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070 .....	13
Puget Sound International Ry. & P. Co. v. Kuyken- dall (W. D. Wash.), 293 Fed. 791.....	9, 10
Railroad & Warehouse Commission v. Duluth Street Ry. Co., 273 U. S. 625, 71 L. ed. 807.....	14
Railroad Commission v. Los Angeles Railway Corp., 280 U. S. 145, 74 L. ed. 234.....	13
Risty v. Chicago, R. I. & Pac. Ry. Co., 270 U. S. 378, 70 L. ed. 641.....	14
Smith v. Cahoon, 283 U. S. 553, 75 L. ed. 1264.....	16
Smith v. Southern Bell Telephone & Telegraph Co., 261 Ky. 421, 104 S. W. 961.....	15
Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819.....	14
Southern Bell Telephone & Telegraph Co. v. City of Louisville, 265 Ky. 286, 96 S. W. (2d) 695.....	12
S. R. Schaff & Co., Inc., v. City of La Grange, 176 Ky. 548, 195 S. W. 1097.....	11
State Corporation Commission v. Wichita Gas Co., 290 U. S. 561, 78 L. ed. 500.....	16
State v. Spokane & Inland Empire Railroad Co., 90 Wash. 599, 154 Pac. 1110, L. R. A. 1918C, 675..	15
St. Cloud Public Service Co. v. St. Cloud, 265 U. S. 352, 68 L. ed. 1050.....	12

*Table of Statutes.*

	PAGE
Swift & Co. v. United States, 276 U. S. 311, 72 L. ed. 587.....	13
Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. ed. 984.....	10, 13
Terrace v. Thompson, 263 U. S. 197, 68 L. ed. 255.....	13
Texoma Natural Gas Co. v. Railroad Commission (W. D. Tex.), 59 Fed. (2d) 750.....	9
Thompson v. Consolidated Gas Utilities Co., 300 U. S. 58, 81 L. ed. 510.....	9, 13, 16
Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. ed. 382.....	12
Truax v. Raich, 239 U. S. 33, 60 L. ed. 131.....	13
Tyson & Bro. (United Theatre Ticket Offices) v. Banton, 273 U. S. 418, 71 L. ed. 718.....	13, 15
Union Light, Heat & Power Co. v. Railroad Commission (E. D. Ky.—1926), 17 Fed. (2d) 143.....	11
United States v. Uncle Sam Oil Co., 234 U. S. 548, 58 L. ed. 1459.....	9
United States Fuel Gas Co. v. Railroad Commission, 278 U. S. 300, 73 L. ed. 390.....	9
Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 51 L. ed. 1155.....	12
Western Distributing Co. v. Public Service Commission, 285 U. S. 119, 76 L. ed. 655.....	9
West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 79 L. ed. 761.....	16
Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287.....	13
Wright v. Central Kentucky Natural Gas Co., 297 U. S. 539, 80 L. ed. 850.....	11

**TABLE OF STATUTES.**

**JUDICIAL CODE**

Sec. 266 (U. S. C. Tit. 28, sec. 380).....	6
Sec. 24 (1) (U. S. C. Tit. 28, sec. 41(1)), as amended—the Johnson Act.....	7, 8, 14, 15, 16

*Table of Text Book.*

	PAGE
<b>KENTUCKY CONSTITUTION</b>	
Sec. 163 .....	4, 10
Sec. 164 .....	4, 10, 11
<b>KENTUCKY UTILITIES ACT (Ky. Stat. 3952-1 to 3952-61, inc.)</b> .....	
Sec. 1 (Ky. Stat. 3952-1) .....	4
Sec. 2(a) (Ky. Stat. 3952-2) .....	16
Sec. 4(b) (Ky. Stat. 3952-13) .....	4
Sec. 4(f) (Ky. Stat. 3952-19) .....	7, 8
Sec. 4(n) (Ky. Stat. 3952-27) .....	4, 5, 12
Sec. 6(d) (Ky. Stat. 3952-36) .....	5
Sec. 7(a) (Ky. Stat. 3952-44) .....	8, 15
Sec. 9 (Ky. Stat. 3952-61) .....	7, 8
 <b>TABLE OF TEXT BOOK.</b>	
1 Bl. Com. 86-7 .....	16

# Supreme Court of the United States

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Appeal From the District Court of the United States for  
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## APPELLANT'S MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL AND STATEMENT OF FACTS AND ACCOMPANYING BRIEF IN SUPPORT THEREOF.

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### MOTION.

Comes now the above-named appellant by its counsel and moves, for reasons hereinafter set forth, that, pending the disposition of this cause in this Court, the above-named appellees be enjoined from further prosecuting against the appellant their attempted investigation, being their Case No. 396, severally in respect of the price for gas fixed by each of the appellant's con-

*Motion.*

tracts for the sale thereof, as mentioned, set forth and prayed for (Tr., pp. 29-30) in its bill of complaint, and the exhibits therewith, that is to say,

(a) Appellant's contract with Central Kentucky Natural Gas Company, for the sale of gas at Lexington, Kentucky, Exhibit B, (Tr., pp. 3, 32).

(b) Appellant's contract with D. L. Johnson, for the sale of gas at Irvine and Richmond, Kentucky, Exhibit C with the bill of complaint (Tr., pp. 3-4, 33).

(c) Appellant's contracts with Peoples Gas Company of Kentucky, for the sale of gas at Barbourville, Kentucky, Exhibits D and E (Tr., pp. 4, 33-4).

(d) Appellant's contracts with said last named company for the sale of gas at Corbin, Kentucky, Exhibits F, G and H (Tr., pp. 4-5, 34-5).

(e) Appellant's contracts with the last named company, for the sale of gas at Manchester, Kentucky, Exhibits I and J (Tr., pp. 5, 35).

(f) Appellant's contract with the last mentioned company, for the sale of gas at Somerset, Kentucky, Exhibit K (Tr., pp. 6, 36).

(g) Appellant's contract with P. P. Edwards and R. C. Eversole, partners as Edwards & Eversole Gas Company, for the sale of gas at London, Kentucky, Exhibit L (Tr., pp. 6, 36).

Or, in the alternative, the appellant so moves that the restraining order granted by the court below (by its decree of July 28, 1937, and by agreement of the parties continued in effect until final decision below upon the merits, by decree below entered August 7, 1937, and dissolved by final decree below entered January 6, 1938, the effect whereof, however, was stayed for a period of thirty days from that date to give the appellant an opportunity to perfect its appeal in this Court) be continued in effect pending the disposition of this cause in this Court; or for such injunctive relief as may other-

wise be proper. The decrees mentioned are printed in the appendix hereto. Since the record has not been printed references are to the transcript.

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**STATEMENT OF FACTS.**

The appellant, Petroleum Exploration, is a Maine corporation, engaged *inter alia* in the production of natural gas from private lands in Owsley, Jackson, Clay and Knox counties, Kentucky, and its transmission intra-state through pipe lines across other private lands (pursuant in both cases to appropriate grants from the land-owners) to the corporate limits of the municipalities of Lexington, Richmond, Irvine, London, Manchester, Somerset, Barbourville and Corbin, at each of which the gas is sold and delivered in bulk (pursuant to formal written contract stating price, quantity and other terms and provisions) to the local utility which distributes it to the public in the municipality. Tr., pp. 2-7, 9, 11, 13, 14, 15, 61-6, 67, 68, 69, 70, 72, 73, 74, 110-13). There is no affiliation between the appellant and the distributing utility at each of Lexington, Richmond, Irvine and London; and the several contracts for deliveries thereat were negotiated at arm's length. (Tr., pp. 16, 75, 89-92, 110-11). The distributing utility (Peoples Gas Company of Kentucky) at each of the remaining municipalities, that is, Manchester, Somerset, Barbourville and Corbin, is a subsidiary of the appellant by virtue of its 25/32nds stock ownership therein. (Tr., pp. 15-6, 74-5, 92, 112).

The contracts provide for the delivery in the aggregate of approximately a billion feet of gas annually at an aggregate price of approximately \$350,000.00 and have from nine years upward to run. (Tr., pp. 32-36, 114). All of the contracts were entered into before the

*Statement of Facts.*

Kentucky Utilities Act (Kentucky Acts of 1934, c. 145, effective June 14, 1934, as amended by such Acts of 1936, c. 92, effective May 16, 1936, appearing as secs. 3952-1 to 3952-61, inclusive, of Carroll's Kentucky Statutes, Annotated, Baldwin's 1936 Revision, hereinafter abbreviated "Ky. Stat.", pertinent sections from which are printed in the appendix).

The distribution of gas in each of the municipalities is made pursuant to a franchise for the purpose granted to the utility by the municipality by authority of secs. 163 and 164 of the Constitution of Kentucky; and as authorized by those sections the distribution rates for gas in each municipality were fixed by contract, in reference to the franchise, entered into between the municipality and the local utility, prior to the enactment of the Utilities Act. (Tr., pp. 7-15, 37-56, 66-74, 113). Sec. 4(n) of the Utilities Act (Ky. Stat. 3952-27) expressly undertakes to authorize the Public Service Commission of Kentucky thereby created (sec. 2(a); Ky. Stat. 3952-2) to change the rates so fixed.

On May 29, 1937, the Commission entered an order on its own motion finding the appellant to be a wholesaler of gas and a "utility" as defined in the Utilities Act; initiating an investigation of the appellant's wholesale gas prices; setting a public hearing for June 29, 1937; and citing the appellant to appear "and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable". (Tr., pp. 19-22, 78-9, 113).

The appellant, conceiving its wholesale prices to be not subject to the rate regulatory power of the Commission, appeared on the day mentioned and offered its objections to the Commission's authority in that behalf, in the nature of a plea to its jurisdiction. The plea was summarily overruled and another order entered by the Commission on or as of that day again finding the appellant to be a "utility" as defined in the Utilities Act and setting the investigation for further hearing on July 29, 1937. (Tr., pp. 22-4, 90-1, 113-4). These orders are printed in the appendix. Within twenty days as provided by sec. 6(d) of the Utilities Act (Ky. Stat. 3952-36) the appellant filed with the Commission its application for rehearing and amended and supplemental objections to its jurisdiction. (Tr., pp. 24-5, 81, 114). The objections set forth are the same as those alleged in the bill of complaint. (Tr., p. 57). The findings of the Commission were not based upon any evidence adduced before it but "on general information of the members of the Commission". (Tr., pp. 28, 85, 114). The Commission intended and threatened to proceed with its investigation without ruling upon the application for rehearing and the amended and supplemental objections. (Tr., pp. 25, 81, 114).

The Commission has not commenced proceedings to reduce the rates of the distributing utilities, but proposes to pass on to the public any reduction in the appellant's wholesale prices by "other and subsequent regulatory action" so the answer avers. (Tr., p. 83).

On July 24, 1937 (Tr., p. 1), the appellant filed its bill of complaint and exhibits and gave notice of an application for a restraining order. The bill (Tr., pp. 1-31) attacks the Commission's authority to regulate the appellant's wholesale prices for gas and sec. 4(n) of the Utilities Act (Ky. Stat. 3952-27) under the due process,

*Statement of Facts.*

equal protection and contract clauses of the United States Constitution; and prays for an injunction against the investigation severally in respect of the price for gas fixed by each of the appellant's wholesale contracts. No obstacle is sought to be interposed to the Commission's obtaining such information as it may desire, either by appellant's disclosure or inspection of its books and records. (Tr., pp. 28-30).

On July 28, 1937, a restraining order was granted and a three-judge court ordered convened as provided in sec. 266 of the Judicial Code (U. S. C. Tit. 28, sec. 380).

The defendant Commission and its members answered admitting the nature and character of the appellant's gas business as above set forth. See references *ante*. The only substantial issues of fact tendered by the answer were in professing no knowledge of the non-affiliation of the appellant and the distributing utilities at Lexington, Richmond, Irvine and London, (Tr., p. 75); and the cost to the appellant of complying with the Commission's order of May 29, 1937, which the bill alleged would be \$25,000.00 (Tr., p. 27), which the answer denied generally (Tr., p. 85), and which the court found to exceed \$3,000.00, exclusive of attorneys' fees. (Tr., p. 114).

The cause came on to be heard on August 7, 1937, upon appellant's motion for an interlocutory injunction and, by agreement of the parties, for final decree upon the merits; and by like agreement the restraining order was continued in effect until final decision. (Tr., pp. 87-9). Testimony was taken on behalf of the appellants from which it appears that its several contracts for gas deliveries at Lexington, Richmond, Irvine and London were entered into with non-affiliates at arm's length and that there is no affiliation between the appellant and the distributing utility in any of those cities (and the court

so found, Tr., pp. 111-2); also that to comply with the Commission's order would cost from \$21,500.00 upward, exclusive of attorney fees. (Tr., pp. 89-95). Sec. 4(f) of the Utilities Act (Ky. Stat. 3952-19) requires among other things the consideration of "reproduction as a going concern" as an element of valuation.

By final decree of January 6, 1937, for reasons set forth in the majority and dissenting opinions (Tr., pp. 99-109), printed in the appendix, but not yet reported, an interlocutory and permanent injunction were denied, the bill dismissed, the restraining order dissolved, and appellant's petition under Equity Rule 74 for an injunction pending appeal denied; but the decree in respect of such dissolution was stayed for thirty-days to permit the appellant an opportunity to perfect its appeal in this Court. (Tr., pp. 117-8).

The majority (Circuit Judge Hicks and District Judge Ford) held that, assuming but not deciding the appellant's constitutional objections to be well founded, it could stand by until the Commission had completed its investigation and entered its final determination and sought to enforce the same by mandamus under sec. 4(b) of the Utilities Act (Ky. Stat. 3952-13) or for the recovery of penalties under sec. 9 thereof (Ky. Stat. 3952-61) and then assert such objections by way of defense, with the ultimate right of appeal to this Court after exhausting its defense in the state courts, which ousted the federal equitable jurisdiction. The minority (District Judge Hamilton) filed a dissent, wherein he disagreed with the position of the majority but agreed in the result because, so he held, the appellant's cause had been removed from the realm of the jurisdiction of a United States district court by the Johnson Act (Act of Congress of May 14, 1934, c. 283, sec. 1, 48 Stat. 775, amendatory of sec. 24 of the Judicial Code, U. S. C. Tit.

*Statement of Facts.*

28 sec. 41 (1)), which he further held was remedial and hence should be liberally construed. The majority opinion does not mention the Johnson Act. The appellees made no question in the court below of its jurisdiction.

The price of appellant's standing by until the Commission has completed its investigation and made its final determination is (1) to permit the Commission to fix the appellant's wholesale contract gas prices upon the Commission's own *ex parte* evidence; (2) to sacrifice the appellant's right to judicial review of the Commission's determination, which must under sec. 7(a) of the Utilities Act (Ky. Stat. 3952-44) be commenced within twenty days; and (3) to expose the appellant and its officers, agents and employees to fines, penalties and punishment under sec. 9 of the Utilities Act (Ky. Stat. 3952-61).

The alternative is the expenditure of many thousand dollars in complying with the Commission's order of investigation in the manner prescribed by the Utilities Act, especially sec. 4(f) thereof (Ky. Stat. 3952-19) respecting the ascertainment of the rate base. If it should then turn out that the price-regulatory investigation and the statute complained of are not constitutional, the loss of such expenditure would be irreparable.

**BRIEF.**

The production of natural gas and its transmission from and across private lands, pursuant in each case to appropriate grants from the several land owners, and its sale in bulk at arm's length by long term contracts to non-affiliated distributing utilities is a private enterprise not affected with a public interest and not subject to price regulation. Compare *United States v. Uncle Sam Oil Co.* (of the Pipe Line Cases), 234 U. S. 548, 561-2, 58 L. ed. 1459; *Western Distributing Co. v. Public Service Commission*, 285 U. S. 119, 126-7, 76 L. ed. 655; *Thompson v. Consolidated Gas Utilities Co.*, 300 U. S. 58, 78-9, 81 L. ed. 510; *Natural Gas Pipeline Co. v. Slatery*, 82 L. ed. (Adv. Ops.) 205, 208; *Nowata County Gas Co. v. Henry Oil Co.*, (8th C. C. A.), 269 Fed. 742, 745-7; *Puget Sound International Ry. & P. Co. v. Kuykendall* (W. D. Wash.), 293 Fed. 791, 793-4; *Texoma Natural Gas Co. v. Railroad Commission* (W. D. Tex.), 59 Fed. (2d) 750, 752-3; and *Pennsylvania R. Co. v. Pittsburgh L. & W. R. Co.*, (6th C. C. A.), 83 Fed. (2d) 861, cert. den. 299 U. S. 572, 81 L. ed. 421.

Like production and transmission, but sale to a subsidiary distributor, while it may be affected with a public interest, is not subject as to price to direct regulation by the rate-making body, whatever may be the authority of that body to regulate the distribution rates of the subsidiary, and to make reasonable allowance only as an operating expense for gas so purchased; the revenues derived by the subsidiary from the public may be divided with the parent company as they may agree, for which the rate-making body cannot substitute its judgment. Compare *Western Distributing Co. v. Public Service Commission*, *supra*, 123-5; and *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 320-1, 73 L. ed. 390.

That the appellant's wholesaling gas to its subsidiary may be affected with a public interest does not so affect its wholesaling to non-affiliates. Compare *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 256, 60 L. ed. 984; *Puget Sound International Ry. & P. Co. v. Kuykendall* (W. D. Wash.), *supra*, 793; *Cheney v. Employers' Liability Assur. Corp.* (9th C. C. A.), 4 Fed. (2d) 826, 827; and *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249.

Secs. 163 and 164 of the Kentucky Constitution are:

"§163. *Streets not to be taken by private corporation without consent; exception.* No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply.

"§164. *Franchise or privilege not to be granted for longer than twenty years; sale of; exception.* No county, city, town, taxing district or other municipality shall be authorized or permitted to grant any franchise or privilege, or make any contract in reference thereto, for a term exceeding twenty years. Before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder; but it shall have the right to

reject any or all bids. This section shall not apply to a trunk railway." (Italics supplied).

These sections have been construed by the highest court of Kentucky, the Court of Appeals, to be, to use its own language (*Irvine Toll Bridge Co. v. Estill County*, 210 Ky. 170, 275 S. W. 634, 636, 637) "self-operative" and to "delegate" to a municipality authority to grant a franchise to a utility; and, in reference thereto, to enter into a contract with the utility fixing rates. Compare, among the numerous decisions, *Moberly v. Richmond Telephone Co.* (1907), 126 Ky. 369, 103 S. W. 714; *Louisville Home Telephone Co. v. City of Louisville* (1908), 130 Ky. 611, 113 S. W. 855, 861; *City of Louisville v. Louisville Home Telephone Co.* (1912), 149 Ky. 234, 148 S. W. 13, 15, 16; *Lutes v. Fayette Home Telephone Co.* (1913), 155 Ky. 555, 160 S. W. 179, 183; *Bastin Telephone Co. v. Mount* (1917), 176 Ky. 26, 195 S. W. 112, 113; *S. R. Schaff & Co. Inc. v. City of La Grange* (1917), 176 Ky. 548, 195 S. W. 1097, 1099; *Campbellsville v. Taylor County Telephone Co.* (1929), 229 Ky. 1843, 18 S. W. (2d) 305, 308; *City of Ludlow v. Union Light, Heat & Power Co.* (1929), 231 Ky. 815, 22 S. W. (2d) 909, 911; *Kentucky Utilities Co. v. City of Paris* (1931), 237 Ky. 488, 35 S. W. (2d) 873, 874; and *Central Kentucky Natural Gas Co. v. City of Lexington* (1935), 260 Ky. 361, 85 S. W. (2d) 870, 872, 873; also *Paducah v. Paducah Railway Co.* (1923), 261 U. S. 267, 272-3, 67 L. ed. 647; *Wright v. Central Kentucky Natural Gas Co.* (1936), 297 U. S. 539, 542, 80 L. ed. 850; and *Union Light, Heat & Power Co. v. Railroad Commission* (E. D. Ky.—1926), 17 Fed. (2d) 143, 148.

It is implicit in sec. 164 that a municipality has authority to make a contract in reference to a franchise; and the Kentucky Court of Appeals in the cases cited and others has held that rates are an appropriate sub-

ject of such a contract. That is "specific authority". Compare *Home Telegraph & Telephone Co. v. Los Angeles*, 211 U. S. 265, 273, 53 L. ed. 176; and *St. Cloud Public Service Co. v. St. Cloud*, 265 U. S. 352, 359-60, 68 L. ed. 1050.

Recently, June 20, 1936, upon review by a single Justice of the Court of Appeals of an order overruling a motion to dissolve a temporary injunction, as permitted by the Kentucky practice, the Justice, in his opinion, discussed the constitutionality of sec. 4(n) of the Utilities Act (Ky. Stat. 3952-27), by way of *obiter dicta*. No rate contract was involved, the ordinance enjoined having sought to reduce a telephone utility's rates without its consent. *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, 265 Ky. 286, 96 S. W. (2d) 695. Other Justices who sat at the hearing concurred in the view that the motion to dissolve should be overruled but not apparently in the *obiter dicta* expressed in the opinion (96 S. W. (2d) 698). In addition to lacking the quality of *stare decisis* such a decision under compulsion of statute could not impair the obligation of a contract. Compare *Los Angeles v. Los Angeles Water Co.*, 176 U. S. 558, 575, headnote 2, 44 L. ed. 886; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 452-3, 68 L. ed. 382; and *Peoples Banking Co. v. Sterling*, 300 U. S. 175, 182-3, headnote 2, 81 L. ed. 586.

A rate contract pursuant to specific authority is within the protection of the contract clause of the United States Constitution and suspends during the term thereof the rate-making power. Compare *Los Angeles v. Los Angeles City Water Co.*, *supra*; *Detroit v. Detroit Citizens' Street Railway Co.*, 184 U. S. 368, 384, 46 L. ed. 593; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S. 496, 515-6, 51 L. ed. 1155; *St. Cloud Public*

*Service Co. v. St. Cloud, supra; and Railroad Commission v. Los Angeles Railway Corp.,* 280 U. S. 145, 74 L. ed. 234.

'To reduce the appellant's wholesale prices for the benefit of the distributing utilities deprives it of its property without due process of law. Compare *Thompson v. Consolidated Gas Utilities Corp., supra*, 79-80.

Injunction is an apt remedy to prevent an unconstitutional attempt to regulate one's business and affairs. Compare *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 60 L. ed. 984; *Packard v. Banton*, 264 U. S. 140, 143, 68 L. ed. 596; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445; *Tyson & Bro. (United Theatre Ticket Offices) v. Banton*, 273 U. S. 418, 427-8, 71 L. ed. 718; *Williams v. Standard Oil Co.*, 278 U. S. 235, 239, 73 L. ed. 287; and *Thompson v. Consolidated Gas Utilities Co., supra*, 59.

The appellant is not obliged to take the risk of prosecution, fines and penalties, of the imprisonment of its officers, agents and employees, or of the loss of its property in order to test the constitutionality of the attempted price-regulatory investigation and statute, rather than resort to the equitable remedy of injunction. Compare *Truax v. Raich*, 239 U. S. 33, 37-9, 60 L. ed. 131; *Pennsylvania v. West Virginia*, 262 U. S. 553, 592-3, 67 L. ed. 1117; *Terrace v. Thompson*, 263 U. S. 197, 215-6; 68 L. ed. 255; *Pierce v. Society of Sisters*, 268 U. S. 510, 535, 69 L. ed. 1070; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 386, 71 L. ed. 303; *Swift & Co. v. United States*, 276 U. S. 311, 326, 72 L. ed. 587; *City Bank Farmers Trust Co. v. Schnader*, 291 U. S. 24, 34, 78 L. ed. 628; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 414, 79 L. ed. 446; and *Carter v. Carter Coal Co.*, 298 U. S. 238, 287-8, 80 L. ed. 1160.

The test of the equitable jurisdiction of a federal court is the presence or absence of an adequate remedy at law in such court, and not the presence or absence of such a remedy in a state court. Compare *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. ed. 819; *Chicago, B. & Q. Railroad Co. v. Osborne*, 265 U. S. 14, 16, 68 L. ed. 878; *Risty v. Chicago, R. I. & Pac. Ry. Co.*, 270 U. S. 378, 388 70 L. ed. 641; *Henrietta Mills v. Rutherford County*, 281 U. S. 121, 126-7, 74 L. ed. 737; *City Bank Farmers Trust Co. v. Schnader*, *supra*, 29; and *Di Giovanni v. Camden Fire Ins. Co.*, 296 U. S. 64, 69, 80 L. ed. 47, 51.

"Rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, 67 L. ed. 659. Compare *Railroad & Warehouse Commission v. Duluth Street Ry. Co.*, 273 U. S. 625, 628, 71 L. ed. 807.

The Johnson Act is:

"\* \* \* Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a *public utility*, (2) does not interfere with interstate commerce, and (3) has been made after *reasonable notice and hearing*, and where a *plain, speedy and efficient remedy* may be had at law or in equity in the courts of such State.  
\* \* \*  
(Italics supplied).

The appellant's wholesale contract gas prices are not "rates". Compare *State v. Spokane & Inland Empire Railroad Co.*, 90 Wash. 599, 154, Pac. 1110, L. R. A. 1918C, 675, 680.

The appellant's status in respect of its sales to non-affiliates under arm's length contracts as a utility *vel non* is a judicial and not a legislative question. Compare *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 536-7, 67 L. ed. 1103; *Michigan Public Utilities Commission v. Duke*, *supra*, 577-8; *Tyson & Bro. v. Benton*, *supra*; also *Cincinnati v. Vester*, 281 U. S. 439, 446, 74 L. ed. 950. The Johnson Act assumes that a complainant is a "public utility". While the Commission, being a legislative body, is without jurisdiction to pass on judicial questions, the matter of its lack of authority to regulate appellant's wholesale prices was urged before it out of courtesy and an abundance of precaution.

To have to drag through a price-fixing investigation in order to determine the question of appellant's being subject thereto is not a "plain, speedy and efficient remedy" to try that question; yet it is extremely doubtful if anything other than a final determination or order of the Commission is reviewable under sec. 7(a) of the Utilities Act (Ky. Stat. 3952-44), or otherwise in the state courts. See *Smith v. Southern Bell Telephone & Telegraph Co.*, 261 Ky. 421, 104 S. W. 961, 963-4. If a remedy in the state courts be doubtful, the Johnson Act is inapplicable. Compare *Corporation Commission v. Carey*, 296 U. S. 452, 457-8, 80 L. ed. 324; and *Mountain States Power Co. v. Public Service Commission*, 299 U. S. 167, 169-70, 81 L. ed. 99.

The Commission's orders finding the appellant to be a "utility" within the meaning of the Utilities Act, not based upon any evidence adduced before the Com-

mission but "on general information of the members of said Commission", were not "made after reasonable notice and hearing". Compare *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 93-4, 57 L. ed. 431; *Baltimore & Ohio Railroad Co. v. United States*, 264 U. S. 258, 265-6, 68 L. ed. 667; *Northern Pacific Railroad Co. v. Department of Public Works*, 268 U. S. 39, 44-5, 69 L. ed. 826; and *West Ohio Gas Co. v. Public Utilities Commission*, 294 U. S. 63, 71, 79 L. ed. 761.

While a valid exercise of legislative policy, the Johnson Act can scarcely be said to supply a defect or abridge a superfluity in the common law, which is, according to Blackstone, the object of remedial legislation. Compare *1 Bl. Com.* 86-7.

The General Assembly of Kentucky, by its definition of a "utility" in sec. 1 of the Utilities Act (Ky. Stat. 3952-1), could not convert a private enterprise into a public utility. Compare *Michigan Public Utilities Commission v. Duke*, *supra*, 577-8, 69 L. ed. 445; *Frost v. Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101; and *Smith v. Cahoon*, 283 U. S. 553, 75 L. ed. 1264. If the appellees contend for an unconstitutional construction, they do so at their peril. Compare *Thompson v. Consolidated Gas Utilities Co.*, *supra*, 74-6.

Inasmuch as opposition is offered only to the Commission's authority to regulate appellant's wholesale gas prices, and not to the Commission's having whatever information it desires, the instant cause in that respect is unlike *State Corporation Commission v. Wichita Gas Co.*, 290 U. S. 561, 569, 78 L. ed. 500; or *Natural Gas Pipe Line Co. v. Slattery*, *supra*; also *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160, 71 L. ed. 978.

To suspend the investigation, insofar as the Commission seeks thereby to regulate the appellant's wholesale prices, pending this appeal, would not harm the public which can receive no benefit until the Commission reduces the distribution rates, which it has made no effort to do, and which it is powerless to do, the franchise rate contracts being inviolate. The first of such contracts to expire is that for Lexington on March 1, 1939 (Tr., pp. 38-9, 43); the others have several years yet to run (Tr., pp. 45, 46, 48, 49, 50, 50-1, 52, 54, 55, 56).

Wherefore, the foregoing motion, statement of facts and brief are respectfully submitted.

EDWARD C. O'REAR of  
Frankfort, Kentucky,

CHAS. N. KIMBALL of  
Sistersville, West Virginia,  
*Counsel for Petroleum Exploration.*

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**APPENDIX.****Kentucky Utilities Act.****§1. (Ky. Stat. 3952-1) Definitions.**

(a) The term "corporation", when used in this act, includes private, *quasi* public and public corporations, an association, a joint stock association, or a business trust.

(b) The term "person", when used in this act, includes a natural person, a partnership, or two or more persons having a joint or common interest, and a corporation as hereinbefore defined.

(c) The term "utility" or "utilities", when used in this Act, shall mean and include persons and corporations or their lessees, trustees or receivers that now or may hereafter own control, operate or manage (one) any facility used or to be used for or in connection with the generation, production, transmission or distribution of electricity to or for the public for compensation for lights, heat, power or other uses; (two) any facility used or to be used for or in connection with the production, manufacture, storage, distribution, sale or furnishing to or for the public for compensation natural or manufactured gas, or a mixture of same, for light, heat, power or other uses; (three) any facility used or to be used for or in connection with the transporting or conveying of gas, crude oil or other fluid substance by pipeline to or for the public for compensation; (four) any facility used or to be used for or in connection with the diverting, developing, pumping, impounding, distributing or furnishing water to or for the public for compensation; (five) any facility used or to be used for or in connection with the transmission or conveyance over wire, in the air or otherwise, of any message either by telephone or telegraph for the public for compensation; (six) any facility used or to be used for or in connec-

tion with the transportation of persons or property by street, suburban or interurban railways for the public for compensation: Provided, however, that for the purposes of this act the term "utility" or "utilities" shall not mean or include any city or town or water districts established in pursuance of Chapter one hundred thirty-nine (139).

(d) The term "facility" or "facilities" when used in this Act, shall be construed in its broadest and most inclusive sense and shall include all property, real, personal, tangible and intangible, and all other means and instrumentalities in any manner, owned, operated, leased, licensed, or used, furnished or supplied for, by, or in connection with the business of any utility.

(e) The term "rate", when used in this Act, shall mean and include the plural number as well as the singular, and every individual or joint rate, fare, toll, charge, rental or other compensation for service rendered or to be rendered by any utility, and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, fare, toll, ~~charge~~ or other compensation, and any schedule or tariff, or part of a schedule or tariff thereof.

(f) The term "service", when used in this Act, is used in its broadest and most inclusive sense, and includes every practice or requirement in any way relating to the service of any utility, including the voltage of electricity; the heat units, the pressure of gas; the purity, pressure and quantity of water, and in general the quality, quantity, and pressure of any commodity or product used or to be used for or in connection with the business of any utility.

(g) The term "commission", when used in this Act, shall refer to and mean the Public Service Commission of Kentucky, unless otherwise indicated.

(h) The term "commissioner", when used in this Act, shall mean one of the members of the commission.

*§2. Public Service Commission Created.*

(a). (Ky. Stat. 3952-2) For the purpose of regulating certain utilities and of carrying out the provisions of this act, an administrative body or commission is hereby established, to be known as the "Public Service Commission of Kentucky", which is hereby declared to be a body corporate with power to sue and be sued, and in its corporate name, as above designated, to adopt a corporate seal bearing the following inscription: "Public Service Commission of Kentucky", which seal shall be affixed to all writs and official documents, and to such other instruments as the commission may direct. All courts shall take judicial note of said seal.

\* \* \* \* \*

*§3. Officers and Employees.*

\* \* \* \* \*

*§4. Powers and Duties of the Commission.*

(a) (Ky. Stat. 3952-12) *Jurisdiction.* The jurisdiction of the commission shall extend to all utilities in this commonwealth as enumerated in Section 1 of this act.

(b) (Ky. Stat. 3952-13) *General Powers of the Commission.* The commission is hereby given power to investigate all methods and practices of such utilities to require them to conform to the laws of this commonwealth, and to all reasonable rules, regulations, and orders of the commission not contrary to law; and to require copies of all reports, rates, classifications and schedules in effect and used by such utilities to be filed with the commission, and also other information desired by the commission relating to any investigation or requirement. Provided, however, that the Commission shall have no jurisdiction over rates that are now the subject of litigation before the Railroad Commission or

in any court between any utility and any municipality of the State until after the expiration of two (2) years from the entry of final order in said litigation. The commission may compel obedience to its lawful orders by mandamus or injunction or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction, and such proceedings shall have priority over all pending cases. Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in such order, or until revoked or modified by the commission, unless the same be suspended, or vacated in whole or in part by order or decree of a court of competent jurisdiction.

(c). *Powers of the Commission with Respect to Rates.*

(1) (Ky. Stat. 3952-14). *Generally.* Whenever the commission after a hearing had upon reasonable notice, upon its own motion or upon complaint, as provided in Section 6 (a) of this act, finds that any existing rates, joint rates, tariffs, tolls or schedules are unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act, the commission shall by order require just and reasonable rates, joint rates, fares, tolls or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient or unjustly discriminatory or otherwise in violation of any of the provisions of this act.

(f) (Ky. Stat. 3952-19) *Valuation.* The commission may on hearing, after reasonable notice, ascertain and fix the value of the whole or any part of the property of any utility in so far as the same is material to the exercise of the jurisdiction of the commission, and make revaluations from time to time and ascertain the

*Appendix.*

value of all new construction, extensions, and additions to the property of such utility. In arriving at a valuation of property of any utility as provided in this Section, the commission shall give due consideration to the history and development of the utility and its property, original cost, cost of reproduction as a going concern, and other elements of value recognized by the law of the land for rate making purposes. Provided, the right of the commission to value and revalue the property of any utility shall not be exercised unless same is necessary or advisable to determine the legality or reasonableness of any rate, service or issuance of any security or securities, and then only after an investigation affecting same has been instituted by the commission or upon complaint or application.

\* \* \* \* \*

(j) (Ky. Stat. 3952-23) *Records and Reports.*

The books, accounts, papers and records of every utility shall be available to the commission for inspection and examination. If said books, accounts, papers and records are not within the state, the commission may by notice and order require the production of same or, at its option, verified copies in lieu thereof, at such time and place as it may designate, so that an examination may be made by the commission. Provided, in the latter instance any expense incurred shall be borne by the utility so ordered. Every utility, when and as required by the commission, shall file with the commission such annual or other reports or information as the commission shall reasonably require. The commission shall prepare and distribute to such utilities blank forms for any information required under this act. All such reports shall be under oath when required by the commission.

\* \* \* \* \*

(n) (Ky. Stat. 3952-27) *Authority of the Commission to Change Contract Rates.* The commission shall have power, under the provisions of this act, to enforce, originate, establish, change and promulgate any rate, rates, joint rates, charges, tolls, schedules or service standards of any utility, subject to the provisions of this act, that are now fixed or that may in the future be fixed, by any contract, franchise or otherwise, between any municipality and any such utility, and all rights, privileges and obligations arising out of any such contracts and agreements regulating any such rates, charges, schedules or service standards, shall be subject to the jurisdiction and supervision of the commission; provided, however, that no such rate, charge, schedule or service standard shall be changed, nor any contract or agreement affecting same shall be abrogated or changed until and after a hearing has been had before the commission in the manner prescribed in this act.

Nothing in this section or elsewhere in this act contained is intended or shall be construed to limit or restrict the police jurisdiction, contract rights, or powers of municipalities or political subdivisions, except as to the regulation of rates and service, exclusive jurisdiction over which is lodged in the Public Service Commission.

**§5. Duties and Privileges of Utilities, Subject to the Regulation of the Commission.**

\* \* \* \* \*

**§6. Procedure.**

\* \* \* \* \*

(d) (Ky. Stat. 3952-36) *Rehearing.* After a determination has been made by the commission in any hearing, any party to the proceedings may, within twenty days after the service of the order upon it, apply for a rehearing in respect of any matters determined in said proceedings and specified in the application for

rehearing, and the commission may grant and hold such hearing on said matters. The commission shall either grant or refuse an application for rehearing within twenty days after the filing of same. Failure by the commission to act upon such application within that period shall be deemed a refusal thereof. Notice of such hearing shall be given as required with respect to original hearings. Upon such rehearsings any party may offer additional evidence which could not, with reasonable diligence have been offered on the former hearing. Upon such rehearing, the commission may change, modify, vacate, or affirm its former orders, and make and enter such order as it may be deemed necessary.

\* \* \* \* \*

#### *§7. Court Review.*

(a) (Ky. Stat. 3952-44) Any party to a proceeding before the commission, or any utility affected by an order of the commission, may within twenty days after service upon it of the commission's order or from the time when the commission has failed to act within the period prescribed in Section 6 (d), commence an action in the circuit court for Franklin County or any other court of competent jurisdiction against the commission as defendant to vacate or set aside such order or determination on the ground that it is unlawful or unreasonable.

If a petition for rehearing has been made as provided in Section 6 (d) of this act, the right to commence an action against the commission shall be continued for a period of twenty days from the service of the final order in such rehearing upon the party desiring to commence the action.

\* \* \* \* \*

(g) (Ky. Stat. 3952-50) *Submission of Evidence to Circuit Court.* The case shall be heard and decided by the Circuit Court upon the evidence submitted to the

Commission as shown by the transcript provided for in Subsection (e) of this Section 7. Upon final submission the Circuit Court shall enter a decree either sustaining the order of the Commission or setting aside and vacating same in whole or in part.

(h) (Ky. Stat. 3952-51) *Appeal to the Court of Appeals.* Either party to said action, within sixty days after the entry of the order of judgment of the circuit court, may appeal to the Court of Appeals of Kentucky, and such appeal, upon the filing thereof in the office of the Clerk of the Court of Appeals, shall be docketed and advanced in similar manner as Commonwealth cases.

*§8. Assessment for Maintaining Commission, and How Apportioned.*

(a) (Ky. Stat. 3952-52) For the purpose of maintaining the commission hereby established, including the payment of salaries, traveling expenses, including hotel bills, printing, rent, light, heat, water, telephone, and all other overhead expenses and the expense of regulation and supervision by the commission of the utilities enumerated in Section 1 of this act, said utilities shall within thirty days after the effective date of this act pay to the State Treasurer of the Commonwealth of Kentucky a sum equal to one-twentieth of one per centum of the total value that has been assessed against the property of said utilities for the year ending December 31, 1932. This fund shall be credited to the account of the commission and shall be used to defray the cost of regulation for the year following the effective date of this act.

\* \* \* \* \*

(b) (Ky. Stat. 3952-53) On or before July first, 1936, and on or before July first of each year thereafter, such expense of maintaining said commission shall be apportioned among and assessed upon said utilities by the commission in proportion to the gross earnings or

receipts of such utilities derived from intrastate business for the next preceding calendar year in which the assessments are made, providing, however, that the total amount so assessed shall not in any year exceed seventy-five thousand (\$75,000.00) dollars. All such fees for the maintenance of the commission shall be paid to the Treasurer of the Commonwealth of Kentucky on or before the first day of July, 1936, and on or before the first day of July of each year thereafter.

\* \* \* \* \*

(h) (Ky. Stat. 3952-59) Any such utility failing to make payment as herein provided for the maintenance of said commission shall forfeit and pay to the state one thousand (\$1,000.00) dollars, and twenty-five dollars for each day such utility refuses, neglects or fails to make such payment, which forfeiture shall not release such utility from the payment of such assessment.

\* \* \* \* \*

§9. (Ky. Stat. 3952-61) *Penalties.*

Every officer, agent or employee of any utility as enumerated in Section 1 hereof, or other person who shall willfully violate any provision of this act, or who procures, aids or abets any violation of this act by any such utility shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand (\$1,000.00) dollars, or be confined in jail not more than six (6) months, or both; and if any such utility shall be a private corporation and shall violate any of the provisions of this act, or shall do any act herein prohibited, or shall fail and refuse to perform any duty imposed upon it under this act for which no penalty has been provided by law, or who shall fail, neglect or refuse to obey any lawful requirement or order made by the commission, for every such violation, failure or refusal such utility shall forfeit and pay into the treas-

ury, a sum not less than twenty-five (\$25.00) dollars, nor more than one thousand (\$1,000.00) dollars, for each such offense; said sum or sums to be paid to the Treasurer and credited to the general fund. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent or other person acting for or employed by any utility acting within the scope of his employment shall in every case, be deemed to be the act, omission or failure of such utility.

Actions to recover the principal amount due and the penalties under this Act shall be brought in the name of the Commonwealth of Kentucky in the Franklin Circuit Court. Whenever any utility is subject to a penalty under this Act, the Commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty, provided the commission may compromise such action and dismiss the same on such terms as the court will approve. The principal amount due shall be paid into the State Treasury and credited to the Commission's account, but all penalties recovered by the Commonwealth of Kentucky in such action shall be paid into the State Treasury and credited to the general fund.

*§10. (Not printed in Ky. Stat.) Construction of Act.*

All laws or parts of laws in conflict with the provisions of this act are hereby repealed. Each section of this act is hereby declared to be separate and independent of every other section thereof, and, if for any reason any section or provision of this act shall be held to be unconstitutional or invalid, no other section or provision of this act shall be affected thereby, as the remaining parts of the act would have been passed by the General Assembly if such unconstitutional or in-

valid section or provision, if any, had been stricken out before the passage of this act by the General Assembly.

### Commission's Orders.

#### BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

A meeting of the Public Service Commission was this day held; present: Commissioners Cammack and McGregor.

IN THE MATTER OF INVESTIGATION ON  
MOTION OF THE COMMISSION OF THE  
RATES, RULES AND PRACTICES OF  
THE PETROLEUM EXPLORATION, INC.

Case No. 396

#### NOTICE OF INVESTIGATION AND ORDER TO SHOW CAUSE

WHEREAS, An examination of the reports of several wholesale and retail gas utilities serving in this state, show that they purchase gas at wholesale rates from the Petroleum Exploration, Inc., Lexington, Kentucky; and

WHEREAS, The Commission has found under Sections 3952-1-12-13, and 14 that the Petroleum Exploration, Inc., is an operating utility in the State of Kentucky, and subject to the jurisdiction of this Commission; and

WHEREAS, It is apparent from a comparison of these rates with those of other companies rendering a similar class of service in Kentucky that these rates may be excessive; and

WHEREAS, These wholesale rates bear a definite relationship to the cost of gas to consumers in the following towns and communities, namely, Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond,

Irvine, Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown; and

WHEREAS, Authority to initiate this investigation is vested in the Commission by Sections 3952-12-13, and 14 of the Kentucky Statutes,

NOW, THEREFORE, NOTICE IS HEREBY GIVEN, That the Commission has entered upon an investigation of the above matters and that a public hearing will be held relative to said matters at the office of the Commission on June 29, 1937, at which time and place any person interested may appear and present such evidence as may be proper in the premises; and

WHEREAS, Under such circumstances the Commission finds the burden of proof upon the utility to show that rates and charges are fair and reasonable, and not arbitrary.

NOW, THEREFORE, IT IS ORDERED:

1. That official representatives of the Petroleum Exploration, Inc., appear at such hearing and present evidence, if any it can, as will show conclusively the fairness and reasonableness of its present rates and charges for gas which it is selling to companies that are in turn selling the same gas at wholesale or retail in this state, or submit for the approval of the Commission such changes and revisions as will make such rates or charges fair and reasonable.

2. That the Petroleum Exploration, Inc., submit at such hearing, a complete statement of all contracts, agreements, and working arrangements between said company and any corporation, partnership, trust, association, or person which controls, directly or indirectly, said company, or which is under domination and control of the interests which control Petroleum Exploration, Inc.

3. That the Petroleum Exploration, Inc., file with the Commission on or before June 29, 1937, a complete and accurate statement of charges appearing on the books of said company for the years 1934, 1935 and 1936, representing payments made or obligations incurred by said company to any such corporation, partnership, trust, association, or person as defined under (2) above, together with the name and address of the party with whom said charge first originated and the actual cost to such party for rendering the service for which said charge was made, and a detailed explanation of the nature of the service performed and by whom performed. Said statement shall include a detailed classification of such charges showing separately each class of service and the charges therefor and amounts cleared to each account.

4. That all books, accounts, records, correspondence and memoranda of the Petroleum Exploration, Inc., be made available for examination by the Commission's representatives.

NOTICE IS HEREBY GIVEN to the Petroleum Exploration, Inc., of the above order of the Commission.

Dated at Frankfort, Kentucky, this 29th day of May, 1937.

[SEAL]

CHAS. J. WHITE,  
*Secretary.*

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF KENTUCKY**

A meeting of the Public Service Commission was held on this date; present: Chairman Beckham, Commissioners Cammack and McGregor.

IN THE MATTER OF INVESTIGATION ON  
MOTION OF THE COMMISSION OF THE  
RATES, RULES AND PRACTICES OF THE  
PETROLEUM EXPLORATION, INC.

} Case No. 396

**ORDER**

This cause coming on to be heard on the plea of the Petroleum Exploration, Inc., to the jurisdiction of the Commission and it appearing to the Commission that the Petroleum Exploration, Inc., is engaged in the business of producing, selling and delivering natural gas to various utility companies, which sell and distribute the same to the public in Corbin, Somerset, Barbourville, Manchester, Burning Springs, Richmond, Irvine, Ravenna, London, Winchester, Mt. Sterling, Cynthiana, Georgetown, Lexington, Paris, Frankfort, Versailles, Midway, and North Middletown, all of which towns and all communities are in Kentucky; and it further appearing that the Petroleum Exploration, Inc., owns, controls, operates, and manages facilities used in connection with the production, storage, distribution, sale and furnishing to and for the public for compensation natural gas for light, heat, power, and other purposes and owns and controls facilities used in connection with the transporting and conveying of gas by pipe line to and for the public for compensation; and it further appearing that the Petroleum Exploration, Inc., is a

"utility" under sections 3952-1-12-13-14 of the Kentucky Statutes; and the Commission being advised,

IT IS ORDERED, That the plea to the jurisdiction of the Public Service Commission by the Petroleum Exploration, Inc., be and hereby it is overruled and that the demurrer to the jurisdiction of the Public Service Commission by the Petroleum Exploration, Inc., be and hereby it is overruled and that this action be and hereby it is set down for formal hearing on Thursday, July 29, 1937, at 10:00 A. M., on the notice of investigation and order to show cause issued by the Commission herein on May 29, 1937, to all of which the Petroleum Exploration, Inc., objects and excepts.

This the 29th day of June, 1937.

PUBLIC SERVICE COMMISSION OF KENTUCKY,

J. C. W. BECKHAM,

*Chairman.*

JAMES W. CAMMACK, JR.,

*Commissioner.*

THOS. B. MCGREGOR,

*Commissioner.*

[SEAL]

Attest:

CHAS. J. WHITE,

*Secretary.*

**Decrees in the Court Below.**

**ORDER GRANTING TEMPORARY RESTRAINING ORDER—**  
Filed and entered July 28, 1937.

Upon plaintiff's motion, duly pursuant to notice, the Court orders that the defendants, Public Service Commission of Kentucky, *et al.*, be and they are hereby restrained, until a motion herein for a temporary injunction can be heard and determined, from proceeding further against the plaintiff in the defendant's investigation Case No. 396.

The Court has found upon the verified Bill of Complaint that irreparable injury would result to the plaintiff unless such temporary restraining order is granted, in that plaintiff would be required to expend the sum of at least Twenty-five Thousand (\$25,000.00) Dollars to comply with the defendant's orders in their said Case No. 396, dated May 29th and June 30th, 1937, respectively, for which there would be no recovery in the event plaintiff should be adjudged final relief herein.

The Court further finds that this suit requires a proceeding under Judicial Code Section No. 266, and hereby convenes a Court of three judges under said section to hear the plaintiff's motion for preliminary injunction on Saturday, August 7, 1937.

The Court fixed the plaintiff's bond upon this temporary restraining order in the penal sum of One Thousand (\$1,000.00) Dollars, then came plaintiff as principal with Earl D. Wallace as surety and executed bond as required by law in said sum which the Court now examines and approves.

This July 28, 1937.

H. CHURCH FORD,  
*Judge.*

**ORDER OF SUBMISSION—Filed and entered August 7, 1937.**

This cause coming on for hearing before the Honorable Zen Hicks, Judge of the Circuit Court of Appeals of the Sixth Circuit, Honorable Elwood Hamilton, Judge of the Western District, and Honorable H. Church Ford, Judge of the Eastern District of Kentucky, sitting as a court assembled under §266 of the Federal Code, thereupon came the plaintiff, Petroleum Exploration, and filed its motion for an interlocutory injunction, and on final hearing a permanent injunction in accordance with the prayer of its bill of complaint; also filed waiver of notice of this hearing by the Honorable Albert B. Chandler, as Governor of Kentucky. Thereupon, all parties having announced ready, the Court heard the testimony of the witnesses offered by the plaintiff to maintain the issue on its part, and cross examination thereof by the defendants, all reported by the Official Court Reporter as prescribed by law and the Rules of this Court. The defendants offered no testimony in chief on their part. Whereupon, by agreement of the parties, the above styled cause is finally submitted upon the entire record made herein and upon the merits for the final decision of the Court.

It is ordered that plaintiff shall have twenty (20) days from this date within which to file its brief, defendants ten (10) days thereafter in which to file their answering brief, and the plaintiff five (5) days thereafter in which to reply, all briefs to be filed in triplicate and copies thereof furnished opposing counsel at the time of filing.

By agreement of the parties, the temporary restraining order heretofore made in this cause is continued in effect until further order and final decision of this cause upon its merits.

It is further ordered that the said Official Reporter do file with the Clerk, as soon as may be, in triplicate

a transcript of the testimony adduced at the said hearing, which shall thereupon become and is made a part of the record in this suit.

H. CHURCH FORD,  
*Judge.*

This order should be entered:

ALLEN PREWITT,

W. J. BRENNAN,

*Attorneys for Plaintiff.*

HUBERT MEREDITH, Atty. Gen.

J. W. JONES, Asst. Atty. Gen.

*Attorneys for Defendants.*

August 7, 1937.

ORDER AND DECREE—Entered January 6, 1938.

This cause having been submitted simultaneously upon plaintiff's application for an interlocutory injunction, upon its application for a permanent injunction, and for a final decree, to the Court, composed of Hon. Zen Hicks, Circuit Judge, 6th Circuit, and Hon. H. Church Ford and Hon. Elwood Hamilton, District Judges, under Section 266 of the Judicial Code of the United States, the Court, with Judge Hamilton dissenting from its conclusions of law but concurring in the dismissal for want of jurisdiction, delivered written opinions and its separate findings of fact and conclusions of law. The Court orders the opinions and the separate findings, etc., filed. Plaintiff excepts to the Court's conclusions of law. The Defendants except to that part of the Court's third finding of fact that the matter in controversy in this suit, exclusive of interest and cost, exceeds the sum of Three Thousand Dollars (\$3,000.00).

Conformably to its opinion and separate findings of fact and conclusions of law, the Court orders and decrees that the application of plaintiff, Petroleum Exploration, Inc., for an interlocutory injunction and also its

application for a permanent injunction be and they are hereby respectively denied; that the temporary restraining order be and it is now discharged; that plaintiff's bill of complaint be and it is hereby finally dismissed without prejudice to any proper proceeding, and all for want of jurisdiction in equity herein; and that plaintiff pay the costs of this proceeding, to all which order and decree the plaintiff excepts.

Pursuant to due waiver of notice by the defendants and by the Governor and Attorney General of Kentucky, through their counsel in open court, plaintiff heretofore tendered its petition for a rehearing and in the alternative its petition for an injunction or continuance of the restraining order pending the determination of its appeal to the Supreme Court of the United States.

It is ordered that said petition for rehearing and said petition for the alternative continuance of the restraining order, or for an injunction pending appeal, be and they are now filed.

The said Court having considered plaintiff's petition for rehearing and in the alternative its petition for an injunction or continuance of the restraining order pending the determination of its appeal to the Supreme Court of the United States, and the Court being advised overrules said petition for rehearing and also overrules said petition for an injunction or continuance of the restraining order pending appeal to the Supreme Court of the United States, to all of which plaintiff excepts.

In order to give plaintiff an opportunity to perfect its appeal herein to the Supreme Court of the United States, it is hereby ordered that this order and decree, insofar as it denies an injunction and dissolves the tem-

porary restraining order, be stayed for a period of thirty (30) days from the date hereof.

This January 6, 1938.

ZEN HICKS,

*U. S. Circuit Judge.*

ELWOOD HAMILTON,

*U. S. District Judge.*

H. CHURCH FORD,

*U. S. District Judge.*

**Opinions in the Court Below.**

UNITED STATES DISTRICT COURT,  
EASTERN DISTRICT OF KENTUCKY

Frankfort—#1205

PETROLEUM EXPLORATION (Inc.) Complainants

v.

PUBLIC SERVICE COMMISSION OF KENTUCKY, etc.

Defendants

Before HICKS, Circuit Judge, and HAMILTON and FORD, District Judges.

FORD, District Judge.

This is an action in equity filed by Petroleum Exploration, a corporation doing business in Kentucky but organized and existing under the laws of the State of Maine, to enjoin the Public Service Commission of Kentucky from enforcing or attempting to enforce compliance with an order of the Commission, pursuant to which the Commission proposes to inaugurate an investigation of the rates charged by complainant for gas transported by its pipe lines from its gas fields in Eastern Kentucky to the corporate limits of various Kentucky municipalities and there sold and delivered to certain public utility corporations.

The order complained of required the complainant to produce, at a public hearing before the Commission, evidence showing conclusively the fairness and reasonableness of its rates and charges, a complete statement of all contracts and working arrangements with its subsidiary corporations, if any, and to make available, for examination by the Commission's representatives, all its books, accounts, records, correspondence and memoranda.

At the time fixed for the hearing, the complainant appeared and offered a plea challenging the Commission's jurisdiction. The Commission overruled the plea and made an order fixing a later date for the proposed hearing and investigation. Before that time arrived, the complainant filed with the Commission an application for a rehearing on the jurisdictional question, together with an amended and supplemental plea which, on account of the institution of this action, has not been acted upon.

In addition to alleging diversity of citizenship and the value of the matter in controversy, required to sustain federal jurisdiction under section 24 of the Judicial Code (28 USCA §1), the bill further alleges, in substance, that the complainant, in transporting and selling its gas under contract to certain public utility corporations, is engaged merely in an ordinary private commercial enterprise, that it is not a public utility and is not subject and can not be made subject to the regulatory jurisdiction of the Commission by any law which would be valid under the State or Federal Constitution. It charges that the obvious purpose of the Commission is to attempt, without right or authority of law, to lower some or all of the rates fixed under its existing contracts, and that the order, made with that end in view, is repugnant to the contract clause of the Federal Constitution and is in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The case is submitted upon complainant's motion for a temporary injunction to restrain enforcement of the order of the Commission. Permanent injunction is the ultimate relief sought.

Injunctive relief is an extraordinary remedy and "the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction." *Cruickshank v. Bidwell*, 176 U. S. 73, 80.

In *State Corporation Commission of Kansas et al. v. Wichita Gas Company*, 290 U. S. 561, it was asserted that a certain order of the State Corporation Commission of Kansas, made as a preliminary step toward ascertaining and fixing reasonable rates to be charged by a public utility, was repugnant to the Federal Constitution, and temporary and permanent injunction was sought. The court, in denying injunctive relief, said:

"We need not decide whether these provisions are repugnant to the Constitution or whether they are otherwise invalid. The invalidity of such an order is not of itself ground for injunction. Unless necessary to protect rights against injuries otherwise 'irremediable, injunction should not be granted."

It is further alleged in the bill, in substance, that the expense necessary to be incurred by the complainant in order to make the showing required by the Commission would be approximately \$25,000 and for the recovery of such expenditure, if made, the complainant would have no remedy and its great loss thereby suffered would be irreparable. It is to prevent such claimed irreparable injury that complainant asserts the right to equitable relief in this action.

The Act of the General Assembly of Kentucky, creating the "Public Service Commission of Kentucky", and fixing and defining its powers and functions (1934 Acts, ch. 145; Kentucky Statutes §3952b-4) provides "The commission may compel obedience to its lawful orders by mandamus or injunctions or other proper proceedings in the Franklin Circuit Court of this Commonwealth, or any other court of competent jurisdiction", and further (sec. 9), after prescribing penalties to be imposed upon utilities for neglect or refusal to obey "any lawful requirement or order made by the commission", the Act provides: "Whenever any utility is subject to a penalty under this Act, the commission shall certify the facts to the Commission Counsel who shall institute and prosecute an action for recovery of such principal amount due and the penalty."

It thus appears that the Commission can do nothing more than institute mandamus proceedings against the complainant in a court of the state to compel observance of its order or certify facts to the Commission Counsel upon which he may base an action in the state court to recover the prescribed penalties. In either event, sole authority for making the Commission's orders coercively effective rests with the court in which such action may be instituted.

It is not shown by the bill that any court proceeding is pending or threatened. Should the Commission, however, apply to the court for mandamus to enforce compliance with its order or should the Commission Counsel institute a proceeding to recover the prescribed penalties, all questions as to the power or jurisdiction of the Commission, the regularity of its proceeding and all questions of constitutional right or statutory authority would then be open for examination and determination by the state court. If the complainant's contention that its rights, guaranteed under the Federal Constitution, would be infringed by enforcement of the order

against it, be properly set up in such action and denied by the highest court of the state, adequate provision is made for review of the action of the state court by the Supreme Court of the United States (Judicial Code §237; 28 USCA §344). *Morgan v. Rogers*, 284 U. S. 521, 526.

In *Federal Trade Commission v. Claire Company*, 274 U. S. 160, certain corporations challenged the constitutional validity of orders of the Federal Trade Commission requiring them to furnish monthly reports of the cost of production, balance sheets and other voluminous information relating to the business in which the complainant corporations were engaged, and sought by injunction to restrain the Commission from enforcing or attempting to enforce the challenged orders. The Court said:

"There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction."

"\* \* \* Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction."

Since the Commission is powerless to coerce observance of the challenged order by inflicting penalties

for disobedience or otherwise, and it is not shown that complainant's business or property rights are in any way threatened by any arbitrary action of the Commission, obviously, notwithstanding the Commission's order, the complainant may passively stand upon its claimed constitutional rights and, when necessary, may assert them in defense of any enforcement proceedings instituted in the courts without, in the meantime, suffering any injury or damage or being compelled to incur any expense whatever.

Equity jurisdiction to grant injunctive relief should be exercised only where "in a case reasonably free from doubt" it is shown that "intervention is essential in order effectually to protect property rights against injuries otherwise irremediable." *Cavanaugh v. Looney et al.*, 248 U. S. 453, 456; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276.

The defendant filed an answer to the bill on the merits without raising the question as to equity jurisdiction. It is pointed out, however, in *Federal Trade Commission v. Claire Company*, *supra*, that acquiescence of the parties is not enough to justify the court in assuming jurisdiction, and the want of equity jurisdiction, if obvious, may and should be objected to by the court, *sua sponte*. *Twist v. Prairie Oil Company*, 274 U. S. 684, 690; *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481.

We are of the opinion that the bill of complaint fails to state a case within the recognized sphere of federal equity jurisdiction, and the motion for temporary injunction should be denied.

By stipulation the case having also been submitted for final determination, the application for a permanent injunction should be likewise denied, and the bill dismissed for want of equity.

**JUDGE HAMILTON, dissenting in part:**

I agree with the conclusion of the majority opinion because the Act of May 14, 1934, Chapter 283, Section 1, 48 Stat. 775 USCA Title 28, Section 41(1), withdraws from the jurisdiction of the District Courts of the United States suits enjoining the execution of orders of administrative boards or commissions where the laws of the State provide a plain, speedy and efficient remedy for a judicial review.

The laws of the Commonwealth of Kentucky provide for an adequate judicial review of the orders and findings of its Public Service Commission. (*Carroll's Kentucky Statutes*, 1936 Edition, Sections 3952-1 to 3952-61). The plaintiff alleges in its petition that it does not come within the term "utility or utilities" as defined under *Carroll's Kentucky Statutes*, 1936 Edition, Section 3952-1, and for that reason this case does not fall within the bar of the Act of May 14, 1934; but I am of the opinion that this Act, being remedial in its nature, should be liberally construed in order that the Courts of the States may be left free to interpret their own statutes. It may be said, however, that the Public Utilities Act of the Commonwealth of Kentucky includes within its terms all persons, corporations, their lessees, trustees or receivers, producing, manufacturing, storing, distributing or selling natural or artificial gas for public consumption. The Act of May 14, 1934, cannot be avoided so as to confer jurisdiction on this Court by a naked allegation of the plaintiff that it is not one of the persons coming within the statutory law of the Commonwealth of Kentucky regulating public utilities.

The Commission, in its order, which the plaintiff seeks to enjoin in this action, found that the plaintiff was a public utility and had authority to fix its rates. The language of the Act (48 Stat. 775) expressly prohibits District Courts from enjoining any order of a State rate-making body.

Lower Federal Courts are creatures of the Congress, and their powers are confined within the Acts bringing them into existence; and whatever may be their inherent power incident to jurisdiction, the Congress can take from them the authority to grant injunctions in rate making cases and confer such power on the Courts of the State, even though a Federal constitutional right is involved. *Ex Parte Robinson*, 19 Wall. 505, 510; *Bessette v. Conkey Company*, 194 U. S. 324; *Michaelson v. United States*, 266 U. S. 42, 66; *Gillis, Receiver v. California*, 293 U. S. 62, 67.

If the majority opinion be correct, the Act of May 14, 1934, was wholly unnecessary, because in no event would the Federal Court enjoin the orders of a public utility rate making body if the State law provided an adequate judicial review.

The case of *State Corporation Commission of Kansas v. Wichita Gas Company*, 290 U. S. 561, 570, relied on in the opinion of the majority, has no application to the case at bar. In the cited case, the Commission sought to compel certain pipe line companies to disclose to it facts to be used in fixing the rates of the distributing companies. The order of the Commission sought to be enjoined did not fix rates, nor was it contended as a basis for relief that the Commission was without authority to inquire into the charges of the Wichita Company. The Court said:

"The Commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be *res adjudicata* when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them. *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 227. *Chicago, M. & St. P. Ry. Co.*

v. Minnesota, 134 U. S. 418, 452, *et seq.* But the decisions of state courts reviewing commission orders making rates are *res adjudicata* and can be so pleaded in suits subsequently brought in federal courts to enjoin their enforcement. Detroit & Mackinac Ry. v. Mich. R. R. Comm'n., 235 U. S. 402, 405. Napa Valley Co. v. R. R. Comm'n., 251 U. S. 366, 373. The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas Court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. Bacon v. Rutland R. Co., 232 U. S. 134, 138. Missouri v. Chicago, B. & Q. R. Co., 241 U. S. 533, 542. Ex Parte Young, 209 U. S. 123, 166. And upon the issue or confiscation *vel non* they are entitled to the independent judgment of the courts as to both law and facts. Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287, 289. Bluefield Co. v. Pub. Serv. Comm'n., 262 U. S. 679, 689. United Railways v. West, 280 U. S. 234, 251."

The plaintiff's suit here is based solely on the ground that the laws of the Commonwealth of Kentucky do not make it subject to the jurisdiction of the Public Service Commission for any purpose. It therefore follows that if plaintiff's contention be sound, it does not have to await the outcome of administrative action before resort to the Courts to determine its rights. The question in dispute is purely a legal one and is not affected to administrative decision. *Gulf v. Interstate Natural Gas Company*, 82 F. (2) 145, 150.

*Federal Trade Commission v. Claire*, 274 U. S. 160, 174, does not lend support to the conclusion of the majority. In that case, the Claire Company sought to enjoin an order of the Federal Trade Commission requiring it to submit reports concerning its business, under

Section 6 of the Act creating it. The Commission's orders were enforceable only by requesting the Attorney General to institute mandamus proceedings against the recalcitrant, or by supplying him with facts necessary to enforce forfeitures. Any proceeding to compel compliance or to recover forfeitures could only be had in the United States District Court on the law side of the docket. The Court refused to grant equitable relief on the ground it had adequate remedy at law in the Federal Courts by presenting its defense to the mandatory or penalty action when instituted.

I have always understood the rule to be that the adequate remedy at law which defeats equitable jurisdiction must be such remedy in the Federal Courts, and not in the State Courts, and it must be a remedy which the Federal Courts can administer under the circumstances of the particular case, and any doubt as to the law remedy must be resolved in favor of the equitable.

The Courts have universally held that Federal Equity jurisdiction is to be tested by those rules, principles and usages as administered by the Federal Courts immediately after the adoption of the Constitution, unaffected by State statutes or practices, regardless of the antiquity of the remedy at law in the State Courts. In other words, a case cognizable by a Federal Court of Equity for inadequacy of legal remedy is still such a case regardless of State legislation or practice enlarging legal remedies, and continues thus until the Congress deprives the Federal Courts of jurisdiction.

The majority opinion, without stated legal justification, and misapplying the *Claire* case, relegates the plaintiff for relief to the Franklin Circuit Court of the Commonwealth of Kentucky, because of the provisions of the Kentucky Statutes, 1936 Edition, Sec. 3952-44.

In the case of *Smyth v. Ames*, 169 U. S. 466, 550, the Court said:

"The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

When the violator is an individual the penalties for failure to comply with the orders of the Public Service Commission are not more than \$1,000.00, or confinement in jail for not more than six months, or both, and if a corporation, not less than \$25.00 or more than \$1,000.00 for each violation, the enforcement thereof to be by the Franklin Circuit Court of the Commonwealth of Kentucky.

In the case of *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 167, the Court, quoting from *Ex parte Young*, 209 U. S. 123, 155, said:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of Equity from such action."

The case of *New Hampshire Gas & Electric Company v. Morse*, 42 F. (2) 490, 495, is directly in point. In that case the Court said:

"It is not reasonable to hold that a person must violate a law and subject himself to possible fines or imprisonment in order to contest the constitutionality of a statute authorizing the imposition of a penalty. Threats of the constituted authorities are sufficient to set in motion an action to contest such rights. *Western Union Telegraph Company v. Andrews*, 216 U. S. 165, 30 S. Ct. 286, 54 L. ed. 430."

Compare also: *Risty v. Chicago, R. I. & Pacific Railway Company*, 270 U. S. 378, 390; *City of Fort Worth v. Southwestern Bell Telephone Company*, 80 F. (2) 972; *DiGiovanni v. Camden Fire Insurance Association*, 296 U. S. 74; *Grandin Farmers Cooperative Elevator Company v. Langer*, 5 F. Supp. 425, affirmed 292 U. S. 605; *City of Commerce v. Southern Railway Company*, 35 F. (2) 331; *Los Angeles Railway Company v. Railroad Commission of California*, 29 F. (2) 140.

For the reasons herein stated, I find myself unable to agree with the majority opinion.

E. C. O'REAR, Frankfort, Ky.,  
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